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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/566,427

01/27/2006

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EXAMINER

PADEN, CAROLYN A

ART UNIT

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1794

MAIL DATE

DELIVERY MODE

05/22/2009

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/566,427	Applicant(s) DIKS ET AL.	
	Examiner Carolyn A. Paden	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 19 May 2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-11 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-11 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--------------------------------------------------------------------------------------|-------------------------------------------------------------------|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 2, 4, 5 and 7-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Atta.

Atta discloses oil with the sitosterol and sitostanol content of Roselle seeds. On Table 4 the amount of sitosterol and sitostanol in Roselle oil and corn oil are both disclosed to have the phytosterol content required in the claims. The claims appear to differ from Atta in the recitation of the use of corn oil or roselle oil in a food product with an aqueous phase. At column 2 of page 457 Roselle is described as being useful in beverages, jam, jelly, sauces and pickles. Upon making a Roselle extract, one of ordinary skill in the art would expect seed oil to be extracted with the calyces and leaves. It would have been obvious to one of ordinary skill in the art to expect Roselle extract to contain seed oil with the phytosterol content of the claims. Further corn oil is disclosed to contain the

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desired phytosterol content of the claims. Corn oil is well known to the average consumer to be an ingredient in the water containing emulsion that is margarine.

A broad range or limitation together with a narrow range or limitation that falls within the broad range or limitation (in the same claim) is considered indefinite, since the resulting claim does not clearly set forth the metes and bounds of the patent protection desired. See MPEP § 2173.05(c). Note the explanation given by the Board of Patent Appeals and Interferences in *Ex parte Wu*, 10 USPQ2d 2031, 2033 (Bd. Pat. App. & Inter. 1989), as to where broad language is followed by "such as" and then narrow language. The Board stated that this can render a claim indefinite by raising a question or doubt as to whether the feature introduced by such language is (a) merely exemplary of the remainder of the claim, and therefore not required, or (b) a required feature of the claims. Note also, for example, the decisions of *Ex parte Steigewald*, 131 USPQ 74 (Bd. App. 1961); *Ex parte Hall*, 83 USPQ 38 (Bd. App. 1948); and *Ex parte Hasche*, 86 USPQ 481 (Bd. App. 1949). In the present instance, claim 2, 4-6 and 8 recites the broad recitation of

phytosterol, and the claim also recites the preferred which is the narrower statement of the range/limitation.

Claims 1, 2, 4, 5 and 7-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Venkatramesh article.

Venkatramesh discloses oil with the sitosterol and sitostanol content of soybean seeds (Glycine max). On Table 2 the amount of sitosterol and sitostanol in the control soybean seed is disclosed to have the phytosterol content required in the claims. The claims appear to differ from Venkatramesh in the recitation of the use of soybean seeds in a food product with an aqueous phase. Soybean seeds are well known to be treated to extract edible oil for use in foods. Soybean oil is well known to the average consumer to be an ingredient in margarine, which is a water containing emulsion. It would have been obvious to one of ordinary skill in the art to use the the oil from the soybean of Venkatramesh in margarine as a food product with an aqueous phase.

Claims 1-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hirokawa (6,753,032) as further evidenced by Venkatramesh or Atta.

Hirokawa discloses the preparation of margarine in example 14. The margarine contains a water phase with soybean oil and the plant sterol composition of example 11. Example 11 shows the esterification of plant sterol. Table 6 shows the extent of esterification of the plant sterol. Table 5 shows the specific phytosterol content of the sterol composition. Hirokawa discloses that any plant sterol source is useful for his invention at column 2, lines 48-56. The claims appear to differ from Hirokawa in the recitation of sitostanol in the composition. Each of Atta and Venkatramesh teach that corn oil and soybean oil are known in the art to contain minor amounts of sitostanol. It would have been obvious to one of ordinary skill in the art to expect a corn oil or soybean oil plant sterol composition of Hirokawa would contain the desired sitostanol composition of the claims. It is appreciated that the use of the product for altering blood chemistry is not mentioned but this is an intended use and does not carry any weight in the claims.

Claims 10-11 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in

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the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The specification does not adequately describe lowering beta sitosterol or triglycerides in the blood with the composition of the claims.

Claims 10-11 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

It is unclear in claims 10 and 11 as to what method steps are intended. Also the claims are in the passive voice. An amendment to the claims clarifying this issue would overcome the rejection.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carolyn A Paden whose telephone number is (571) 272-1403. The examiner can normally be reached on Monday to Friday from 7 am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached by dialing 571-272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Carolyn Paden/

Primary Examiner 1794

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